Harkness v *Bell's Asbestos and Engineering Ltd*[4] Lord Diplock was referring to an order which is a nullity, not an order which has been irregularly obtained.

The default judgment in this case until set aside is a good and enforceable judgment. The correct law on this issue is as stated in *Isaacs* v *Robertson*[5] where the headnote reads:

> Orders made by a court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinctions between orders that are 'void', in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void ipso facto without the need for proceedings to set them aside.

In the speech of Lord Diplock reference was made to the passage in the judgment of Romer LJ in *Hadkinson* v *Hadkinson*:[6]

> It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.

In this case the application to set aside the default judgment although made on 4 April 1987 was only served on KSY on 19 May 1990. It was exhibited for the first time in the company's application in the proceeding.

It was clear to us that KSY was perfectly entitled to rely on the default judgment as basis for its rights to be a supporting creditor and KSY should be recognized in the petition as a supporting creditor.

The appeal was accordingly allowed with costs here and below.

Appeal allowed.

Solicitors: *Gill & Tang*; *Murthi & Partners*.

Reported by *Prof Ahmad Ibrahim*

Leong Brothers Industries Sdn Bhd v Jerneh Insurance Corp Sdn Bhd

HIGH COURT (PENANG) — CIVIL APPEAL NO 12-95-84
WAN ADNAN J
27 OCTOBER 1990

Insurance — Marine insurance — 'All Risks' cargo policy — Construction of policy — Cargo carried on deck due to carriers' default — Whether loss covered under 'All Risks'

Civil Law Act — English Marine Insurance Act 1906 — Applicability of

The appellants were the owners and shippers of a cargo of ten cases of men's sports shoes with rubber soles lately laden on board the vessel 'Masindo' under bill of lading no PS-5 dated 24 October 1978 for carriage to and delivery at Sibu, Sarawak. The goods were to be carried below deck. The appellants took up insurance policy no AG1/78 MA/1677-M with the respondents insuring the goods against 'All Risks'. The carriers carried the goods on deck in breach of the contract of carriage thereby causing damage to the goods. The appellants had obtained judgment in default against the carriers. The appellants' claim against the respondents for indemnity for their loss under the 'All Risks' policy was dismissed in the lower court. The issue on appeal was whether the 'All Risks' cover embraced the loss due to the carriers' default in carrying the goods on deck.

Held, allowing the appeal:

(1) By virtue of s 5 of the Civil Law Act 1956, the law applicable is the English Marine Insurance Act 1906.

(2) Damage, if it is to be covered by 'All Risks' policies, must be due to some fortuitous circumstance or casualty.

(3) The damage to the goods was fortuitous and not due to any wilful misconduct on the appellants' part. The damage was caused in circumstances beyond the appellants' control and solely as a result of the said goods being improperly carried by the carriers.

(4) Rule 17 of the 'Rules for Construction of Policy' in the schedule to the English Marine Insurance Act 1906 does not arise as the goods were shipped as cargo to be carried below deck. Insuring them specifically as deck cargo did not arise.

(5) The 'All Risks' cover covers the risk of default by the carriers.

[Bahasa Malaysia Summary

Perayu merupakan tuanpunya dan pengirim melalui kapal untuk satu kargo yang mengandungi sepuluh kotak kasut sukan dengan tapak getah. Kargo ini telah dimuatkan ke dalam kapal 'Masindo' di bawah senarai barang-barang dagangan kapal yang bernombor PS-5 yang bertarikh 24 Oktober 1978 untuk muatan dan penghantaran ke Sibu, Sarawak. Barangan itu sepatutnya dimuatkan di dek bawah. Perayu mengambil polisi insuran bernombor AG1/78 MA/1677-M dengan responden untuk menginsuranskan barangan itu terhadap 'Semua Risiko'. Pengirim melalui kapal itu memuatkan barangan di atas dek. Ini merupakan satu pecah kontrak muatan dan barangan itu telah rosak. Perayu telah mendapatkan penghakiman terhadap pengirim melalui kapal itu. Tuntutan perayu terhadap responden untuk tanggung rugi untuk kerugian yang dialami di bawah polisi 'Semua Risiko' telah di tolak di mahka-

mah rendah. Isu semasa rayuan adalah sama ada 'Semua Risiko' merangkumi kerugian yang berikutan daripada keengkaran pengirim melalui kapal dalam memuatkan barangan itu di atas dek.

Diputuskan, membenarkan rayuan:

(1) Mengikut s 5 Akta Undang-Undang Sivil 1956, undang-undang yang terpakai ialah English Marine Insurance Act 1906.

(2) Kerosakan yang dirangkumi oleh polisi 'Semua Risiko' mestilah berikutan daripada keadaan yang tidak dijangka atau malapetaka.

(3) Kerosakan ke atas barangan itu adalah sesuatu yang tidak dijangkakan dan bukan berikutan daripada sebarang salah laku sengaja oleh perayu. Kerosakan telah berlaku dalam keadaan yang di luar kawalan perayu dan akibat daripada muatan secara salah oleh pengirim melalui kapal.

(4) Kaedah 17 dalam 'Kaedah untuk Pentafsiran Polisi' di dalam jadual kepada English Marine Insurance Act 1906 tidak berbangkit kerana barangan dimuatkan sebagai kargo yang dimuat di bawah dek. Menginsuranskan barangan itu khusus sebagai dek kargo tidak berbangkit.

(5) Perlindungan di bawah 'Semua Risiko' merangkumi risiko keengkaran oleh pengirim melalui kapal.]

[*Editorial Note:* The respondents have appealed to the Supreme Court vide Civil Appeal No 04-16-90.]

Case referred to

1 *British and Foreign Marine Insurance Co* v *Gaunt* [1921] All ER 447 (folld)

Legislation referred to

Civil Law Act 1956 s 5
Marine Insurance Act 1906 [UK]

Navaratnam for the appellants/plaintiffs.
Aline Celia for the respondents/second defendants.

Cur Adv Vult

Wan Adnan J: This is an appeal against the decision of the learned president of the sessions court in dismissing the plaintiffs' claim against the second defendants. The plaintiffs had obtained judgment against the first defendants by default.

The first defendants were at all material times common carriers for reward and the owners of the vessel known as 'Masindo'. The first defendants received at the Port of Penang on board their vessel 'Masindo' ten cases of men's sport shoes with rubber soles ('the said goods') in good order and condition valued at $24,740.10 the property of the plaintiffs for carriage for reward to the Port of Sibu, Sarawak for delivery to Messrs Ngiu Kee Store, Sibu and the first defendants issued in respect thereof the bill of lading no PS-5 dated 24 October 1978. The plaintiffs were the owners and the shippers of the said goods under the bill of lading. The said goods were to be carried below deck.

The plaintiffs took up insurance policy no AG1/78MA/1677-M with the second defendants whereby the second defendants in consideration of the payment of the premiums as mentioned therein agreed to insure the said goods valued at $24,740.10 against 'All Risks'. Clause 5 of the policy provides:

> This insurance is against all risks of loss or damage to the subject-matter insured ...

The first defendants in breach of the contract of carriage caused the said goods to be carried on deck. By reason thereof the said goods were damaged.

The issue for the court to decide was whether, in view of the first defendants' default in the carriage contract to carry the said goods below deck the plaintiffs are entitled to succeed against the second defendants under the insurance policy. In other words, whether the 'All Risks' cover embraces loss due to the carriers' default.

By virtue of s 5 of the Civil Law Act 1956 the law applicable is the English Marine Insurance Act 1906. Section 30 of the Act provides as follows:

> (1) A policy may be in the form in the First Schedule of the Act.
> (2) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

Rule 17 of the 'Rules for Construction of Policy' in the schedule states as follows:

> The term 'goods' means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

In *British and Foreign Marine Insurance Co* v *Gaunt*,[1] Lord Birkenhead LC said [at p 449]:

> In construing these policies it is important to bear in mind that they cover 'all risk'. These words cannot, of course, be held to cover all damage, however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies. There is little authority on the point, but the decision of Walton J, in *Schloss Bros* v *Stevens* [1906] 2 KB 665, on a policy in similar terms, states the law accurately enough. He said ([1906] 2 KB at p 673) that the words 'all risks by land and water (as used in the policy then in question) were intended to cover all losses by any accidental cause of any kind occurring during the transit. There must be a casualty.'
>
> Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstances or casualty. Rowlatt J accepted this view, but was of opinion that the evidence proved a state of facts which was consistent with the damage having occurred:
>
> 'without the intervention of anything fortuitous, of anything accidental, or of anything which could be called a casualty within the meaning of an insurance contract.'

I agree with the criticism of the Master of the Rolls upon this finding. The damage proved was such as did not occur, and could not be expected to occur, in the course of a normal transit. The inference remains that it was due to some abnormal circumstances, some accident or casualty. We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss. In this case the respondent established that the loss must have been due to some casualty, and consequently the judgment of the Court of Appeal upon this point is right.

Viscount Finlay in the same case said [at p 452]:

Of course, no one would contend that a policy of this kind would cover ordinary wear and tear or deterioration incidental to the transit of goods. There must be something in the nature of an accident to bring the policy into play. It would be quite enough if, owing to some accidental circumstances, the goods were left uncovered when rain was falling. This might happen by some want of care on the part of the men whose duty it was to keep the goods covered with the tarpaulins which were provided for the purpose. If, from any of the accidental circumstances which are incident to a journey, the goods are damaged by a risk covered by a policy, the element of casualty or accident is supplied. There is nothing in the present case to show that the damage was due to any wilful misconduct on the part of the assured.

Lord Sumner in the same case said [at p 454-455]:

'All risks' has the same effect as if all insurable risks were separately enumerated; for example, it includes the risk that when it happens to be raining the men who ought to use the tarpaulins to protect the wool may happen to be neglecting their duty. This concurrence is fortuitous; it is also the cause of the loss of wetting. It appears to be what happened. For wool to get wet in the rain is a casualty, though not a grave one; it is not a thing intended, but is accidental; it is something which injures the wool from without; it does not develop from within. It would not happen at all if the men employed attended to their duty.

There are, of course, limits to 'all risks'. They are risks and risks insured against. Accordingly, the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances in which it is carried.

The footnote on p 151 of *Templeman on Marine Insurance* (5th Ed) says:

It is suggested that this sentence (refering to the last sentence quoted from the judgment of Lord Sumner above) implies 'properly or normally carried'. If, for example, in circumstances entirely beyond the control of the assured, goods are damaged solely as a result of their being improperly stowed or carried, it may well be that such improper stowage or carriage would be regarded as introducing an element of fortuity.

The learned author of the same book at p 152 says:

Loss resulting from theft or pilferage is recoverable under an 'all risks' policy because, although it might be argued that there is nothing fortuitous or accidental about theft or pilferage, which are conscious and wilful acts of other persons, such loss is nevertheless fortuitous, in so far as the assured is concerned, in the sense that he is deprived of his goods by some unexpected act.

In the present case the said goods were contracted to be carried below deck. If the said goods had been so carried they would not have been damaged. But the first defendants caused the said goods to be carried on deck in breach of the contract of carriage and the said goods became damaged. I find there is element of fortuity. It was fortuitous that the said goods became damaged. The damage was not due to any wilful misconduct on the part of the assured, ie the plaintiffs. The damage was caused in circumstances beyond the control of the plaintiffs. It was caused solely as a result of the said goods being improperly carried by the first defendants.

Counsel for the second defendants also submitted that as required by r 17 of the 'Rules for Construction of Policy' stated above the said goods should have been insured specifically as deck cargo. In my view the said r 17 does not apply. The said goods were not shipped as deck cargo. They were shipped as cargo to be carried below deck. Thus insuring the said goods specifically as deck cargo did not arise.

In my view the 'all risks' cover covers the risk of default by the carriers. The second defendants are therefore liable to the plaintiffs for the loss. I therefore allowed the appeal with costs and ordered that judgment be entered against the second defendants for the sum, interests and costs as prayed.

Appeal allowed.

Solicitors: *Vello & Associates; Skrine & Co.*

Reported by *Jeff Leong Pak Lim*